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No. 80-1188

In the Supreme Court of the United States

OCTOBER TERM, 1981

JAMES EDGAR,
APPELLANT,

v.

MITE CORPORATION AND MITE HOLDINGS, INC.,
APPELLEES.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR APPELLANT

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QUESTIONS PRESENTED

Whether the Illinois Business Take-Over Act conflicts with the Williams Act amendments to the Securities Exchange Act of 1934?

Whether the Illinois Business Take-Over Act regulates evenhandedly to effectuate strong legitimate local interests that outweigh the incidental effect on interstate commerce, and is valid under the commerce clause?

LIST OF PARTIES

JAMES EDGAR, Appellant

MITE CORPORATION and MITE HOLDINGS, INC., Appellees

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BRIEF FOR APPELLANT

OPINION BELOW

The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, has not been reported, but is included in the appendix to the Jurisdictional Statement at p. 32a. The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 633 F.2d 486 (7th Cir. 1980).

JURISDICTION

Appellees initiated this action in the United States District Court for the Northern District of Illinois, Eastern Division pursuant to Section 27 of the Securities and Exchange Act of 1934 (15 U.S.C. §78aa), 28 U.S.C. §§1332, 1337 and 42 U.S.C. 1983, and the district court held that the Illinois Business Take-Over Act (Ill. Rev. Stat. 1979, ch. 121½, §137.51 et. seq.) was unconstitutional.

The judgment of the United States Court of Appeals for the Seventh Circuit, affirming the district court, was entered on October 17, 1980. See p. 42a. A notice of appeal to this Court was duly filed on January 5, 1981, in the United States Court of Appeals for the Seventh Circuit. See p. 43a.

The United States Supreme Court noted probable jurisdiction on May 4, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article 1, section 8 of the United States Constitution provides in pertinent part that:

> The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

Article VI of the United States Constitution provides in pertinent part that:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be

> the supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Illinois Business Take-Over Act, Ill. Rev. Stat. 1979, ch. 121½, §137.51 et seq. (See Appendix to Jurisdictional Statement, p. 45a)

Williams Act amendments to the Securities Exchange Act of 1934 (15 U.S.C. §78m(d)-(e), 78n(d)-(f)(1976). The pertinent sections are set forth in the Appendix to the Jurisdictional Statement, at 65a.

STATEMENT OF THE CASE

Appellant, James Edgar, is the Secretary of State of Illinois and is charged with the administration and enforcement of the Illinois Business Take-Over Act (Ill. Rev. Stat. 1979, ch. 121½, §137.51 *et seq.*) (the "Illinois Act"). MITE Corporation and MITE Holdings, Inc., (collectively "MITE") sought to make a cash tender offer for the shares of Chicago Rivet and Machine Co. ("Chicago Rivet") without having to comply with the Illinois Act. Chicago Rivet is a publicly-held Illinois Corporation with its principal executive offices in Bellwood, Illinois. Chicago Rivet has 866,264 shares of common stock outstanding and 2,181 shareholders of record. Of those shareholders, 589 are residents of Illinois, and they own 377,395 common shares.

On January 19, 1979, MITE filed a Schedule 14D-1 with the Securities and Exchange Commission (the "SEC") concerning its proposed tender offer, pursuant to section 14(d)(1) of the Williams Act, 15 U.S.C. §78n(d)(1)(1976), and Regulation 14D promulgated thereunder. MITE's proposed tender offer of $28.00 per share for all the shares of Chicago

Rivet represented a premium of more than $4.00 per share over the market price preceding announcement of the offer.

MITE initiated this action on January 19, 1979, seeking to have the district court declare the Illinois Act null and void on its face because it violated the supremacy and commerce clauses of the United States Constitution. In addition MITE sought injunctive relief prohibiting then Secretary of State Alan J. Dixon and Chicago Rivet from enforcing the Illinois Act against it in connection with its proposed tender offer.

On January 22, 1979, Chicago Rivet filed an action in the Court of Common Pleas of Blair County, Pennsylvania, alleging that MITE was in violation of the Pennsylvania Take-Over Disclosure Law, 70 Pa. Cons. Stat. Ann. tit. 70, §71 *et seq.* (Purdon Supp. 1978). The court issued an *ex parte* order enjoining MITE from pursuing its tender offer pending further hearing on January 26, 1979. On January 22, 1979, Chicago Rivet also filed a complaint with the Pennsylvania Securities Commission. MITE removed the action filed in the Court of Common Pleas of Blair County to the United States District Court for the Western District of Pennsylvania, and also filed a complaint seeking to have the Pennsylvania Act declared unconstitutional and to have its enforcement enjoined. On January 31, 1979, the Pennsylvania Securities Commission determined that it would not invoke the Pennsylvania Act, and on the next day the District Court for the Western District of Pennsylvania denied Chicago Rivet's motion for a temporary restraining order.

On February 1, 1979, Dixon executed a temporary cease and desist order and notice of hearing regarding the proposed tender offer and notified MITE that the order and notice would be served February 5, 1979. On February 2, 1979, the district court entered an order preliminarily enjoining Dixon from enforcing the Illinois Act against MITE in connection with its tender offer for the shares of Chicago Rivet. MITE published

its tender offer to all shareholders of Chicago Rivet in the national edition of the Wall Street Journal on February 5.

The district court entered its final judgment order on February 9, 1979, declaring the Illinois Act to be null and void. The district court held that the Illinois Act was preempted by the Williams Act and created an undue burden on interstate commerce in violation of the commerce clause. The district court also permanently enjoined Dixon from enforcing the Illinois Act against MITE in connection with its tender offer for the shares of Chicago Rivet.

Appellant appealed to the Court of Appeals for the Seventh Circuit from the final judgment order of the district court declaring the Illinois Act to be null and void. The Court of Appeals for the Seventh Circuit affirmed, holding that the Illinois Act was preempted by the Williams Act and also constituted an undue burden on interstate commerce in violation of the commerce clause.

SUMMARY OF ARGUMENT

I. The Williams Act amendments to the Securities Exchange Act of 1934, 15 U.S.C. §§78m(d)-(e), 78n(d)-(f) (1976), resulted from the growing use of the cash tender offer as an unregulated method of corporate acquisition. The sole purpose of the Williams Act was to protect investors confronted with a tender offer. *Piper v. Chris-Craft Industries Inc.*, 430 U.S. 1, 22, 35(1977). Illinois is among the great majority of states than have enacted state takeover statutes, which supplement the protection afforded investors in the Williams Act.

When the exercise by a state of its police power is challenged under the Supremacy Clause, the beginning assumption is that the historic police powers of the States are not superseded "unless that was the clear and manifest purpose of

Congress." *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978). Congress has not expressly barred the states from regulating tender offers, and this Court has said that section 28(a) of the 1934 Act, 15 U.S.C. §78bb(a)(1976), "was plainly intended to protect, rather than to limit, state authority." *Leroy v. Great Western United Corp.*, 443 U.S. 173, 182(1979). Although the Seventh Circuit Court of Appeals said that section 28(a) was designed to save state Blue Sky laws, the Williams Act is within the scope of the savings clause, which has prospective effect.

Congress has not implicitly preempted concurrent state regulation of tender offers, as the Williams Act is not a pervasive scheme of legislation that occupies the whole field. Nor is the field of securities regulation an area of paramount federal importance, such as national security or foreign affairs, in which federal legislation that is not pervasive will nevertheless preempt state legislation. *Pennsylvania v. Nelson*, 350 U.S. 497 (1956); *Hines v. Davidowitz*, 312 U.S. 52 (1941).

The coexistence of federal and state regulation of securities transactions is established, and the "proper approach is to reconcile the operation of both statutory schemes with one another rather than holding one completely ousted." *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414, U.S. 117, 127 (1973). The objective of the Williams Act to protect the investor confronted with a tender offer does not require uniformity or exclusivity so as to preclude supplemental state regulation.

There is no conflict between the Illinois Act and the Williams Act that renders compliance with both impossible. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963). Nor does the Illinois Act stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting the Williams Act. *Hines, supra*, at 67.

The Williams Act is basically a minimum disclosure statute. Apart from requiring disclosure the Williams Act also gives tendering shareholders the right to withdraw stock within the first seven days of an offer or anytime after sixty days. If an offer is for less than all of the outstanding shares, those shares tendered in the first ten days must be taken up pro rata by the offeror. If the amount of consideration is increased all tendering shareholders will receive the higher price. The Williams Act also has a broad antifraud provision.

The purpose of the Williams Act is to protect the investor as opposed to making a definitive balance between the position of the offeror and that of incumbent management. *Piper, supra,* at 35. Any congressional policy of evenhandedness does not go to the purpose of the legislation. The Seventh Circuit Court of Appeals, however, said that the Williams Act was also designed to preserve a neutral balance between incumbent management and offeror. By providing an investor with additional protection, the Illinois Act does not thwart the purpose of Congress in enacting the Williams Act merely because the balance between the offeror and incumbent management may be affected. If Congress had intended for the Williams Act to create a definitive balance between the offeror and incumbent management, it could have easily expressed such an intent in clear and unambiguous language. *New York State Department of Social Services v. Dublino*, 413 U.S. 405, 415 (1973).

The Illinois Act requires an offeror to file a registration statement with the Secretary of State, but the Secretary can accept the filing required by the federal government. (Ill. Rev. Stat. 1979, ch. 121½, §137.54C., D.). The offer becomes registered 20 business days later, unless the Secretary accelerates or delays the period or calls a hearing. (Ill. Rev. Stat. 1979, ch. 121½, §137.54E.). A hearing is to commence within ten days and the Secretary is to issue a decision within

fifteen days, unless the Secretary extends the period for the protection of Illinois offerees. (Ill. Rev. Stat. 1979, ch. 121½, §137.57C., E.). The Illinois Act does not create an exemption for a friendly takeover, and it regulates the activities of the target company as well as those of the offeror.

The Seventh Circuit Court of Appeals said that Congress has specifically rejected proposals for a prenotification period, and that hearings are not contemplated under the Williams Act. *MITE Corp. v. Dixon*, 633 F.2d 486, 497 (7th Cir. 1980). The fact that Congress considered but did not adopt an advance notice rquirement does not establish that inclusion of such a provision in the Illinois Act conflicts with the Williams Act. *DeCanas v. Bica*, 424 U.S. 351, 360 (1976).

The time periods within which the Secretary is to hold a hearing and issue a decision do not create delays of possibly infinite duration merely because the Secretary is empowered to extend the periods when necessary to protect the interests of Illinois offerees. The fact that the Secrtary must hold a hearing if requested by a majority of the outside directors or Illinois residents holding 10% of the shares of the target company does not provide incumbent management with the means to create lengthy delay as the Secretary will administer his duties expeditiously in the interest of Illinois residents who are shareholders of the target company. Reasonable delay is appropriate as it allows investors adequate time to make an informed decision and also creates the potential for an auction market in which a competitive bid might be made. The reasonable delay necessitated by the Illinois Act will not preclude the making of tender offers.

The Seventh Circuit Court of Appeals also said that the Illinois Act deviates from a market approach and adopts a "benevolent bureaucracy" approach, but the Secretary has never contended that his review of a tender offer would encompass looking at the substantive fairness of the amount of

the offer. The inclusion of the word "inequitable" in section 7.E. of the Illinois Act is coupled with "fraud" and "deceit" and does not empower the Secretary to review the amount of the offer.

As noted by the Seventh Circuit Court of Appeals the new rules promulgated by the SEC governing tender offers are inapplicable to the case at bar. 17 C.F.R. §240-14d-1 *et seq. MITE, supra,* at 499, n.25. The Illinois Act does not stand as an obstacle to the sole purpose of Congress in enacting the Williams Act, which was to protect investors confronted with a tender offer.

II. The power of the federal government to regulate commerce under the Commerce Clause "does not exclude all state power of regulation." *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 140 (1973). State legislation serving legitimate local interests that does not discriminate against interstate commerce is valid even though it affects commerce. *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429 (1978). In areas in which federal and local powers are concurrent a "delicate adjustment" must be made of the conflicting state and federal claims. *Id.* at 440. When a statute regulates evenhandedly to advance legitimate local interests and "its effects on interstate commerce are only incidential" it will prevail unless the burden imposed "is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). When a legitimate local interest is present, the question becomes one of degree, and the degree of burden that is permissible depends on the nature of the local interest and whether it could be served with a lesser effect on interstate commerce. *Id.* at 142.

Chicago Rivet is an Illinois corporation and its principal executive office is in Illinois. Over 43% of Chicago Rivet's common stock is held by the 27% of its shareholders who are residents of Illinois. The Seventh Circuit Court of Appeals said

that the Illinois Act could apply even if no shareholders resided in Illinois, but the Secretary could exempt such an offer as not necessary for the protection of Illinois securityholders. (Ill. Rev. Stat. 1979, ch. 121½, §137.52-9 (5)). The Illinois Act also contains a comity provision. (Ill. Rev. Stat. 1979, ch. 121½, §137.53.).

The Illinois Act advances two legitimate local interests by protecting resident shareholders and regulating the transfer of control of an Illinois or Illinois based corporation. Protecting investors residing in a state has long been recognized as a legitimate state objective. *Hall v. Geiger-Jones Co.*, 242 U.S. 539 (1917). The Illinois Act supplements the protection provided in the Williams Act by ensuring that resident investors have adequate time to make an informed decision and that there has been proper disclosure.

Illinois also has a legitimate local interest in regulating the transfer of control of an Illinois or Illinois based corporation with substantial contacts in the state. Regulation of a tender offer is sufficiently similar to regulating the internal affairs of an Illinois corporation in matters such as a merger or other fundamental corporate changes, shareholder liability and election of directors. Shipman, *Some Thoughts About the Role of State Takeover Legislation: The Ohio Takeover Act*, 21 Case Western L. Rev. 722 (1970); Boehm, *State Interests and Interstate Commerce: A Look at the Theoretical Underpinnings of Takeover Legislation*, 36 Wash. and Lee L. Rev. 733 (1979). Regulation of the internal affairs of a corporation based in a state is historically a proper subject of state regulation as the corporation is a creature of the state. *Sante Fe Industries v. Green*, 430 U.S. 462, 479 (1977).

The Illinois Act has only an incidental effect on interstate commerce, and it does not impede the ability of an offeror to make a tender offer. The pre-offer filing, the possibility of a hearing and longer duration of an offer are simply not burdens

of a magnitude that would preclude an offeror from making a tender offer. The extraterritorial effect of the Illinois Act is a necessary consequence to protecting Illinois shareholders, who could otherwise be simply excluded from a tender offer.

The Seventh Circuit court of Appeals said that had the Secrtary not been enjoined over 23 million dollars of interstate commerce would have been affected. It is wrong, however, to judge the Illinois Act by what the effect of non-compliance would be on interstate commerce. Complying with the Illinois Act would cause the offeror to incur an additional expense, but this is a slight burden in relation to the cost of purchasing another company.

Illinois' substantial interests in ensuring that its residents who are confronted with a tender offer have adequate time to make an informed decision based on complete disclosure is substantial. Likewise Illinois has a substantial local interest in regulating the transfer of control of an Illinois or Illinois based corporation. These interests outweigh the burden of compliance, which merely creates an expense for the offeror that is incidental to the acquisition of another company.

ARGUMENT

I.

THE ILLINOIS BUSINESS TAKE-OVER ACT IS NOT INFIRM UNDER THE SUPREMACY CLAUSE BECAUSE STATE REGULATION THAT PROVIDES ADDITIONAL PROTECTION FOR THE SHAREHOLDER CONFRONTED WITH A TENDER OFFER DOES NOT CONFLICT WITH THE WILLIAMS ACT.

The Williams Act amendments to the Securities Exchange Act of 1934, 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f)(1976), resulted from the increasing use of the cash tender offer during

the 1960's as a virtually unregulated method of corproate acquisition. *Piper v. Chris-Craft Industries, Inc.*, 430 U.S.1, 22(1977). When Congress enacted the Williams Act the State of Virginia had already enacted a statute regulating takeovers (Va. Code §§ 13.1-528 *et seq.*(1978), effective March 5, 1968). Illinois is among the great majority of states that have subsequently enacted statutes regulating tender offers.[1] This Court has said that the sole purpose of the Williams Act was to protect investors confronted with a tender offer. *Piper, supra* at 35. The Illinois Business Take-Over Act (Ill.Rev.Stat. 1979, ch. 121 1/2, §137.51 *et seq.*) (hereinafter "Illinois Act") supplements the protection afforded a shareholder confronted with a tender offer and does not stand as an obstacle to the accomplishment of the purpose of Congress in enacting the Williams Act.

When the exercise by a state of its police power is challenged under the Supremacy Clause, this Court said in *Ray v. Atlantic Richfield Co.*, 435 U.S.151, 157(1978), that:

> '[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 91 L.Ed. 1447, 67 S.Ct. 1146 (1947); *Jones v. Rath Packing Co.*, 430 U.S.519, 525,51 L.Ed.2d 604,97 S.Ct. 1305(1977).

The Seventh Circuit Court of Appeals did not hold that Congress has expressly barred the states from regulating tender offers. *MITE Corp. v. Dixon*, 633 F.2d 486(7th Cir. 1980). This Court has already said that Section 28(a) of the Securities Ex-

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[1] See, Note, *Securities Law and the Constitution: State Tender Offer Statutes Reconsidered*, 88 Yale L.J. 510, 514-515, n29(1979)(hereinafter *"Tender Offer Statutes Reconsidered"*), which lists the analogous statutes enacted in 36 States.

change Act of 1934[2] "was plainly intended to protect, rather than to limit, state authority." *Leroy v. Great Western United Corp.*, 443 U.S. 173, 182(1979). The Williams Act contains no language explicitly preempting concurrent state regulation of tender offers, and on the occasions that Congress has amended the Williams Act it has not expressly preempted state takeover statutes. *AMCA International Corp. v. Krouse*, 482 F.Supp.929, 935(S.D. Ohio, 1979).

The Seventh Circuit Court of Appeals said, however, that section 28 of the 1934 Act was designed to save state Blue Sky laws. *MITE, supra* at 491, n.5. Any argument that the savings clause in the 1934 Act is inapplicable to cash tender offers because they were not in existence at that time does not of course provide a basis for inferring that Congress did intend to preempt state regulation of tender offers. One commentator has argued that the legislative history of the 1934 Act does not indicate that the savings clause was intended to be only retrospective and that Congress did contemplate concurrent regulation of all aspects of securities.[3] Also tender offers are similar to proxy solicitations, which states have traditionally regulated. Accordingly, the Williams Act is within the scope of the savings clause of the 1934 Act.

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[2] Section 28(a), as set forth in 15 U.S.C. §78bb(a)(1976), provides in pertinent part:

> Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder.

[3] Note, *Preemption and the Constitutionality of State Tender Offer Legislation*, 54 Notre Dame Law. 725, 731-32(1979).

Although Congress may implicitly preempt all state regulation by enacting a pervasive scheme of legislation that occupies the whole field, the Williams Act is not an example of such legislation. The Williams Act, which provides for disclosure and certain minimum substantive rights, is not comparable to a pervasive scheme of federal regulation such as the regulation of aircraft noise that led to a conclusion of preemption in *Burbank v. Lockheed Air Terminal*, 411 U.S. 624,629-33(1973). Nor is the field of securities regulation an area of paramount federal importance, such as national security or foreign affairs, in which federal legislation that is not pervasive will nevertheless preempt state legislation. See *Pennsylvania v. Nelson*, 350 U.S. 497, 504-505(1956); *Hines v. Davidowitz*, 312 U.S. 52, 67(1941).

The coexistence of federal and state regulation of securities transactions is established. *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117,127(1973); *SEC v. National Securities*, 393 U.S. 453,461(1961). The established historical precedent of dual state and federal regulation in the field of securities regulation demonstrates that Congress did not implicitly rule out supplementary state regulation of tender offers by enacting the Williams Act. The objective of the Williams Act to protect the investor confronted with a tender offer does not require uniformity or exclusivity so as to preclude supplemental state regulation. In considering the regulatory scheme contained in the Illinois Act with that contained in the Williams Act, the "proper approach is to reconcile the operation of both statutory schemes with one another rather than holding one completely ousted." *Merrill Lynch, supra* at 127.

As Congress has not explicitly or implicitly preempted state regulation of tender offers, the resulting inquiry is whether the Illinois Act conflicts with the Williams Act. When state regulation conflicts directly with federal regulation so that compliance with both is impossible, state regulation is exclud-

ed without inquiry into congressional design. *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43(1963). As no such conflict is present, between the Illinois Act and the Williams Act, the validity of the Illinois Act depends upon whether it "stands as an obstable to the accomplishment and execution of the full purposes and objectives of Congress" in enacting the Williams Act. *Hines, supra*, at 67. Whether the Illinois Act constitutes such an obstacle requires determining if Congress, in addition to providing protection for an investor confronted with a tender offer, also intended that the Williams Act would establish a definitive balance between the offeror and the target company management that could not be altered.

The Williams Act is basically a minimum disclosure statute. Section 13(d) requires that any person who acquires more than 5% of a class of securities registered under section 12 must within 10 days send to the issuer and file with the SEC a statement disclosing the background and identity of the offeror, the source and amount of funds, any plans to liquidate or sell the assets of the issuer or merge it, the number of shares held, and any arrangements with any person regarding any securities of the issuer. (15 U.S.C. §78m(d)(1976)). Section 14(d) provides that prior to initiating a tender offer, the offeror must file a statement with the SEC containing the information required by section 13(d) and any other information which the SEC may require along with copies of the solicitations. (15 U.S.C. §78n(d)(1976)). Apart from requiring disclosure the Williams Act also affords shareholders certain substantive rights. Tendering shareholders can withdraw stock within the first seven days of an offer or any time after sixty days. (15 U.S.C. §78n(d)(5)(1976)).[4] When a tender offer is for less than all of the outstanding shares those shares

[4] The SEC has extended the seven day withdrawal period contained in the Williams Act to fifteen business days. 17 C.F.R. §240.14d-7(1979).

tendered during the first ten days must be taken up pro rata by the offeror. (15 U.S.C. §78n(d)(6)(1976)). If the amount of consideration is later increased all tendering shareholders will receive the higher price. (15 U.S.C. §78n(d)(7)(1976)). The Williams Act also contains a broad antifraud provision. (15 U.S.C. §78n(e)(6)(1976)).

The overriding theme of the Williams Act is that of protecting the investor as opposed to undertaking a definitive balancing of the position of an offeror versus that of the target company management. In *Piper v. Chris-Craft Industries Inc.*, *supra* this Court held that Congress did not contemplate a private cause of action by an unsuccessful offeror. As noted this Court said that the sole purpose of the Williams Act was to protect investors confronted with a tender offer. *Piper, supra* at 35. Although Congress sought a policy of evenhandedness, this does not go to the purpose of the legislation. *Id.* at 29. The Chairman of the Securities and Exchange Commission testified that:

> . . . [T]he principal point is that we are not concerned with assisting or hurting either side. We are concerned with the investor who today is just a pawn in a form of industrial warfare. . . . The investor is lost somewhere in the shuffle. This is our concern and our only concern. Hearings before the Subcommittee on Securities of the Senate Committee on Banking and Currency on S.510, 90th Cong., 1st Sess., 178(1967).

The Seventh Circuit Court of Appeals, however, concluded that the Williams Act protects investors by a "market approach" and is also designed to preserve a neutral balance between incumbent management and offeror. *MITE, supra* at 492-93. See *Great Western United Corp. v. Kidwell*, 577 F.2d 1256(5th Cir. 1978). By providing an investor confronted with a tender offer with additional protection, the Illinois Act,

however, does not thwart the purpose of Congress in enacting the Williams Act merely because the balance between the offeror and incumbent management may be affected or a particular offeror might not prevail.

The mere congressional expressions in favor of neutrality do not transform the Williams Act into a comprehensive national policy regarding all aspects of tender offers, which would only be made after careful legislative weighing of all the political and economic ramifications.[5] This Court has refused to find a cause of action when it would serve "at best a subsidiary purpose" of the federal legislation. *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 478(1977). If Congress had intended for the Williams Act to create a definitive balance between the offeror and incumbent management, precluding supplemental regulation by the states, it could have easily expressed such an intent in clear and unambiguous language. *New York State Department of Social Services v. Dublino*, 413 U.S. 405,415(1973). As the Williams Act is not a pervasive scheme of legislation that occupies the field and there is a historical precedent of dual federal and state regulation of securities, the Illinois Act cannot be deemed preempted by the Williams Act merely because it might alter the positions of the offeror and target company as a result of enhancing the protection afforded an investor.

To register a takeover offer under the Illinois Act an offeror must file with the Secretary of State and mail to the target company a registration statement disclosing the information required by the Williams Act and certain additional information, but the Secretary may accept in lieu of the registration statement the filing required by the federal government. (Ill.Rev.Stat.1979, ch. 121 1/2, §137.54C.,D.)(A.49a-52a).

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[5] See Shipman, *Some Thoughts About The Role Of State Takeover Legislation: The Ohio Takeover Act*, 21 Case Western L. Rev. 722, 759-60(1970).

The Illinois Act provides that an offer becomes automatically registered 20 business days after the filing of the registration statement, unless the Secretary accelerates or delays the period or calls a hearing.[6] (Ill.Rev.Stat.1979, ch. 121 1/2, §137.54E.)(A. 52a). The Illinois Act provides for a hearing if the Secretary deems it necessary for the protection of Illinois offerees, or if one is requested by a majority of the outside directors or by Illinois residents who hold at least 10% of the shares (Ill.Rev.Stat.1979, ch. 121 1/2, §137.57A.) The hearing is to commence within ten days, unless extended by the Secretary for the protection of Illinois offerees or the convenience of the parties, and the Secretary is to issue a decision within fifteen days of the hearing unless the protection of Illinois offerees requires an extension. (Ill.Rev.Stat.1979, ch. 121 1/2, §137.57 C.,E.).[7]

The Illinois Act does not create an exemption for a friendly takeover, and it regulates the activities of the target company as well as those of the offeror. The Illinois Act requires the

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[6] The 20 day pre-offer filing required under the Illinois Act conflicts with the SEC's new Rule 14-d-2. 17 C.F.R. §240.14d-2b. The Seventh Circuit Court of Appeals did not rely on the new SEC rules because those rules do not apply to tender offers made prior to their effective date. 44 Fed.Reg. 70326(1979). Cf. *AMCA, supra,* 482 F.Supp. at 933-34, n.4.

[7] The Illinois Act also supplements the substantive benefits afforded offerees by the Williams Act in requiring that an offer must remain open for a minimum of 20 calendar days, and that an offeree may withdraw shares tendered during the first 17 calendar days after the offer is made. The foregoing time periods would also apply to any material change in the terms of the offer. (Ill.Rev.Stat.1979 ch. 121 1/2, §137.59 B.,C.). The Act also provides that when an offer is for less than all the outstanding shares, the shares must be taken up pro rata. (Ill.Rev.Stat.1979, ch. 121 1/2, §137.59D.). In its opinion the Court of Appeals did not make a determination whether these provisions would also be preempted by the Williams Act. *MITE, supra* at 499 n.25.

target company as well as the offeror to submit any solicitation material to the Secretary of State. (Ill. Rev. Stat. 1979, ch. 121½, §137.55.) (A.52a). The target company is prohibited from soliciting against a takeover offer before it becomes registered, except that a target company may communicate with its securityholders as permitted by the 1934 Act. (Ill. Rev. Stat. 1979, ch. 121½, §137.58.(1)) (A.54a-55a). The target company is subject to the antifraud provisions of the Act as well as the provisions for criminal sanctions. (Ill. Rev. Stat. 1979, ch. 121½, §137.63.A., B.) (A.60a). This is unlike the situation in *Kidwell,* in which the court said that the Idaho Act provides substantially weaker regulation of the activities of the target company. *Kidwell, supra* at 1279. The Idaho Act also provided the target company with the ability to exclude an offer from regulation by approving it. *Id.* at 1278.

The Seventh Circuit Court of Appeals held that the pre-offer notification period and the hearing provision in the Illinois Act conflict with the Williams Act and shift the balance in favor of the target company. *MITE, supra* at 494-95; (A.14a-15a). The court said that Congress has "repeatedly rejected proposals for prenotification" periods. *Id.* at 497; (A.19a). The court also said that no hearings are contemplated under the Williams Act. *Id.* at 497; (A.19a). The mere fact that Congress considered but did not adopt an advance notice requirement does not establish that the inclusion of such a provision in the Illinois Act conflicts with the Williams Act. *DeCanas v. Bica*, 424 U.S. 351, 360 (1976). Similarly, the fact that the Williams Act does not provide for a hearing does not mean that Illinois is preempted from allocating additional government resources to enforce the provisions in the Illinois Act through an administrative hearing.

The Court of Appeals said that the time periods in the Illinois Act, within which the Secretary is to hold a hearing and issue a decision, create delays of possibly infinte duration

because the Secretary is empowered, when necessary to protect the interests of Illinois offerees, to extend the periods. *MITE, supra* at 494-95; (A.14a-15a). In conjunction with the foregoing, the Court also found objectionable the provision providing that the Secretary shall hold a hearing if requested by a majority of the outside directors of the target company or residents of Illinois holding 10% of the stock. The Court said that this would give incumbent management a means to stymie a takeover indefinitely. *Id.* at 494-95; (A.14a-15a). Although the respective ten and fifteen day periods, in which the Secretary is to hold a hearing and issue a determination, could be extended by the Secretary when necessary, they certainly constitute legislative guidelines within which the Secretary would usually act. Even if incumbent management can cause a hearing to be held as the Court of Appeals said, this hardly establishes that incumbent management could cause indefinite delay as the Secretary will administer the Illinois Act to protect the interests of Illinois shareholders. Review by the Secretary will not necessarily result in greater delay as the target company can already seek injunctive relief in the courts.

The question of whether some delay benefits the investor has been the subject of much debate as noted by the Court of Appeals. The opponents of the Williams Act predicted that it would have a crippling effect upon offerors, but it has been suggested that the Williams Act had no impact on the relative strength of management and the offeror. *Shipman, supra* n.5 at 760-61. The Williams Act only provides certain minimum requirements, and the reasonable delay necessitated by the Illinois Act will allow investors more time in which to make an informed decision while also ensuring compliance with the disclosure requirements through neutral review by the Secretary. Despite the increasing number of state takeover statutes the use of the tender offer mechanism for corporate

acquisition has not lessened. *AMCA, supra* at 938; *Tender Offer Statutes Reconsidered, supra* n. 1, at 523; Note, *The Constitutionality of State Takeover Statutes: A Response to Great Western*, 53 N.Y.U.L. Rev. 872, 902, 913-14 (1978). The reasonable delay necessitated by the Illinois Act will not preclude the making of tender offers even though a particular offeror might be ultimately unsuccessful if in the interim a competitive bid is made. If the shareholders receive a better price because of an auction market, the purpose of the Williams Act is not thwarted merely because the first offeror was unsuccessful.

Apart from the foregoing, the Court of Appeals also said that the Illinois Act deviates fundamentally from the market approach in the Williams Act by adopting a "benevolent bureaucracy" approach because section 7.E. of the Illinois Act provides, in pertinent part, that:

> If the Secretary finds that the takeover offer fails to provide full and fair disclosure to the offerees of all material information concerning the takeover offer, *or that the takeover offer is inequitable or would work or tend to work a fraud or deceit upon the offerees,* ... the Secretary shall by order deny the registration of the takeover offer or condition its registration upon certain changes or modifications ... (emphasis added) Ill. Rev. Stat. 1979, ch. 121½, §137.57.E. (A.54a).

The Court of Appeals said that inclusion of "or that the takeover offer is inequitable" empowers the Secretary to pass on the substantive fairness of the offer. The Secretary has not construed this section as empowering him to judge the substantive fairness of the amount of the premium over the market price, which remains the unfettered decision of the investor. The word "inequitable" is coupled with "fraud" and "deceit" and simply does not put the Secretary in the position

of looking at the amount of the offer.[8] Review by the Secretary of whether there has been full disclosure, or whether the offer would be inequitable or work a fraud or deceit protects the shareholder who, in the absence of incomplete or misleading disclosure or fraud, will decide whether to tender his shares. Protecting the shareholder against fraud is not inconsistent with the Williams Act, which contains anti-fraud provisions. 15 U.S.C. §§78m(e), 78n(e) (1976).

As noted by the Seventh Circuit Court of Appeals the new rules promulgated by the SEC governing tender offers are inapplicable to the case at bar. 17 C.F.R. §240-14d-1 *et seq. MITE, supra* at 499 n. 25. As the instant tender offer preceded the effective date of the new rules, the question of whether the SEC exceeded its authority or of whether the Illinois Act is valid under the new rules is not before this Court.

Review of the supplemental protection afforded investors confronted with a tender offer under the Illinois Act demonstrates that it does not conflict with sole purpose of Congress in enacting the Williams Act, which was to protect investors.[9] Securities regulation is a field in which coordinate state and federal regulation is well established. The protection of investors is not dependent upon the exclusivity of the Williams Act. The Illinois Act regulates the activities of the target com-

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[8] Although this is stated in the disjunctive "or" Illinois decisional law does permit construing "or" as the conjunctive "and" when "a literal reading is inconsistent with an apparent legislative purpose". *Campbell v. Prudential Insurance Co. of America*, 15 Ill. 2d 308, 155 N.E.2d 9, 10-11 (1959).

[9] See *AMCA, supra* 482 F. Supp. 929; *City Investing Co. v. Simcox*, 476 F. Supp. 112 (S.D. Ind. 1979), *aff'd*, 633 F.2d 56 (7th Cir. 1980); *Strode v. Esmark, Inc.*, [1980] Fed. Sec. L. Rep. (CCH) ¶97, 538 (Ky, Cir. Ct. 1980); *Wylain, Inc. v. TRE Corp.*, 412 A. 2d 338 (Del. Ch. 1980).

pany and the offeror and maintains a market approach consistent with the Williams Act. Strengthening the position of the investor, by ensuring that he has adequate time to make an informed decision and that an offeror has complied with the Act, does not stand as an obstacle to effectuating the sole purpose of Congress in enacting the Williams Act to protect the investor. When Congress enacted the Williams Act it neither explicitly nor implicitly preempted concurrent state regulation of tender offers. As the Illinois Act advances the purpose of the Williams Act, it is manifestly clear that the Illinois Act is valid under the Supremacy Clause.

II.

STATE TAKEOVER LEGISLATION WHICH REGULATES EVENHANDEDLY TO EFFECTUATE LEGITIMATE LOCAL INTERESTS, THAT OUTWEIGH THE INCIDENTAL EFFECT ON INTERSTATE COMMERCE, DOES NOT CONTRAVENE THE COMMERCE CLAUSE.

The Commerce Clause grants Congress the power "[t]o regulate Commerce . . . among the several States. . . ." U.S. Const., Art. 1, §8, cl. 3. It is settled, however, that "the National Government's power, under the Commerce Clause, to regulate commerce does not exclude all state power of regulation." *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 140 (1973). State legislation serving legitimate local interests that does not discriminate against interstate commerce is valid under the Commerce Clause even though it affects commerce. *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 36 (1980); *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 440 (1978). In *Raymond* this Court quoted the established rule that:

> "[I]n areas where activities of legitimate local concern overlap with the national interests expressed by

> the Commerce Clause — where local and national powers are concurrent — the Court in the absence of congressional guidance is called upon to make 'delicate adjustment of the conflicting state and federal claims.' *H.P. Hood & Sons, Inc. v. DuMond, supra*, at 553, [93 L. Ed. 865, 69 S. Ct. 657] (Black, J., dissenting) . . . ." *Id.* at 440.

The test used in making the "delicate adjustment" is contained in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), in which this Court said that:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Huron Cement Co. v. Detroit*, 362 U.S. 440, 443. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

It is clear that the Illinois Act regulates evenhandedly as it ensures equal treatment of all shareholders in the target company and does not distinguish between shareholders residing within and without Illinois. Similarly, the Illinois Act applies equally to Illinois offerors and foreign offerors. Nor does the Illinois Act differentiate between "hostile" and "friendly" offers.

A "target company" under the Illinois Act is one in which 10% of the shares are held by securityholders located in Illinois, or that meets two of the following conditions: (a) has its principal executive office in [Illinois]; (b) is organized under the laws of [Illinois]; (c) has at least 10% of its stated capital

and paid-in surplus represented in [Illinois] (Ill. Rev. Stat. 1979, ch. 121½, §137.52-10). Chicago Rivet is an Illinois corporation with its principal executive office in Illinois. Over 43% of Chicago Rivet's common stock is held by the 27% of its shareholders who are residents of Illinois. The Seventh Circuit Court of Appeals said that the Illinois Act would have applied even if no shareholder of Chicago Rivet resided in Illinois. If no shareholders resided in Illinois, however, the Secretary could exempt the offer from registration as not necessary for the protection of Illinois securityholders. (Ill. Rev. Stat. 1979, ch. 121½, §137.52-9 (5)). The Illinois Act also contains a comity provision, which provides that when the Secretary of State finds that another jurisdiction is applying a statute that affords substantially equal protection, the registration and filing requirements of the Illinois Act will not apply. (Ill. Rev. Stat. 1979, ch. 121½, §137.53.).

The Illinois Act advances two legitimate local interests by protecting resident shareholders and regulating the transfer of control of an Illinois or Illinois based corporation. Protecting investors residing in a state has long been recognized as a legitimate state objective. *Hall v. Geiger-Jones Co.*, 242 U.S. 539, 551 (1917). *AMCA, supra*, 482 F. Supp. at 939. The Illinois Act supplements the protection provided in the Williams Act by ensuring that resident shareholders will have adequate time to make an informed decision, and that review by the Secretary will ensure that the offeror has complied with the disclosure requirements.

Illinois has a second legitimate local interest in regulating the transfer of control of Illinois or Illinois based corporations with substantial contacts in the State. Illinois can regulate the internal affairs of an Illinois corporation in matters such as a merger or other fundamental corporate changes, shareholder liability and election of directors. See Shipman, *Some Thoughts About the Role of State Takeover Legislation: The Ohio Takeover Act*, 21 Case Western Reserve L. Rev. 722, 742-5 (1970); Boehm,

State Interests and Interstate Commerce: A Look at the Theoretical Underpinnings of Takeover Legislation, 36 Wash. and Lee L. Rev. 733, 743-46 (1979). A tender offer is sufficiently analogous to traditional internal affairs transactions of a corporation which are the subject of state regulation. A successful tender offer means a shift in control in which the initial step is a change in the directors or their policies. A tender offer is like a de facto proxy solicitation because the securityholder who retains some of his shares is also "electing future directors and determining future board policy to govern the remainder of his securities." Shipman, *supra*, at 744. Congress recognized that tender offers are functionally equivalent to proxy fights. H.R. Rep. No. 1711, 90th Cong. 2d Sess (1968). A securityholder who retains his shares in effect receives new shares with a reduction in his voting power. A tender offer does not, however, result in a change in the formal corporate structure, and there is an absence of action contractually binding all shareholders at the corporate level such as in a merger. But a successful offeror will acquire a fiduciary relationship to the corporation and its securityholders. The offeror will obtain control through the securityholders acting in unison via the mechanism of the tender offer. The cumulative effect of a tender offer so closely resembles a proxy solicitation that Illinois can regulate a tender offer as an internal affair of an Illinois or Illinois based corporation. Shipman, *supra*, at 745.

The Illinois Act regulates the internal affairs of an Illinois or Illinois based corporation, which is historically a proper subject of state regulation as a corporation is a creature of the State. *Santa Fe Industries v. Green*, 430 U.S. 462, 479 (1977); *Cort v. Ash*, 422 U.S. 66, 84 (1975). In *Santa Fe Industries* this Court said that:

> .... Absent a clear indication of congressional intent, we are reluctant to federalize the substantial portion of the law of corporations that deals with transactions in securities, particularly where

> established state policies of corporate regulation would be overriden. As the Court stated in *Cort v. Ash, supra*: 'Corporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law *expressly* requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation.' 422 U.S. at 84, 45 L. Ed. 2d 26, 95 S. Ct. 2080 (emphasis added). *Id.* at 479.

Historically, the state of incorporation has provided general shareholder protections without regard to the residence of a shareholder. As a shareholder protection measure, the Illinois Act can properly apply to all shareholders of Chicago Rivet, an Illinois corporation. *Boehm, supra*, at 743. States have also been able to enact regulatory measures, such as state antitrust laws, that affect corporations having a substantial presence in the state. *Id.* at 744. Accordingly, the Illinois Act clearly furthers the legitimate local interest in regulating the transfer of control of an Illinois or Illinois based corporation.

The Illinois Act has an incidental effect on interstate commerce, but it does not seriously impede the ability of an offeror to proceed with a tender offer. The additional disclosure required under the Illinois Act does not impose a significant burden on an offeror. Requiring that material information be disclosed is hardly the type of burden that would impede making a tender offer. Nor do requiring a pre-offer filing, the possibility of a hearing and the longer duration of an offer constitute the type of burdens which would preclude the making of tender offers. The extraterritorial effect of the Illinois Act is an ancillary consequence of vindicating the protection of the large numbers of Chicago Rivet's shareholders who are Illinois residents.

The incidental effect of the Illinois Act on interstate commerce stands in marked contrast to the situation in *A & P Tea*

Co. v. Cottrell, 424 U.S. 366 (1976) in which the legislation had the effect of barring distribution in Mississippi of wholesome milk produced in Louisiana. Balanced against this exclusion was an asserted local interest in maintaining health standards which this Court said "borders on the frivolous." *Id.* at 375. Nor is the Illinois Act an example of parochial legislation such as in *Philadelphia v. New Jersey*, 437 U.S. 617 (1978) in which New Jersey had attempted to close its borders to the importation of out of state waste. The burdens imposed by a state attempting to regulate the length of trains or trucks constitutes a substantial obstacle to the free flow of interstate commerce in a field requiring uniformity. *Raymond Motor Transportation, supra*, 434 U.S. at 443-4; *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 775-6 (1945). In *Pike* the effect of the state law would be to require the company to build an unneeded plant in Arizona, and this type of burden is "virtually per se illegal." *Pike, supra*, 397 U.S. at 145. Although the state full train crew law upheld in *Brotherhood v. Chicago, R.I. & P.R. Co.*, 393 U.S. 129, 139 (1968) was a safety measure, which receives greater deference, this Court noted that the added financial burden was not such to seriously impede interstate commerce. The requirements of the Illinois Act do not impose burdens of constitutional magnitude on the making of tender offers.

In its decision the Seventh Circuit Court of Appeals said that had the Secretary of State not been enjoined over 23 million dollars of interstate commerce would have been affected. The burden of compliance with the Illinois Act, however, is not such that it would prevent the making of a tender offer. It is wrong to judge the effect of non-compliance with the Illinois Act on interstate commerce. By complying with the Illinois Act the offeror cannot proceed as rapidly and it will incur extra expense, but such incidental burdens will not deter an offeror who has made the decision to acquire another company.

The final step under the *Pike* test is to balance the benefits from the legitimate local interests against the burden imposed on interstate commerce. Illinois has a substantial interest in ensuring that its residents who are confronted with a tender offer have adequate time to make an informed decision based on complete disclosure. The potential for investors receiving a higher offer as a result of management having some time to arrange an alternative offer or if the initial offer is subsequently increased accrues to all securityholders of the target company. Expeditious initial review by the Secretary of State ensures that fraudulent or deceptive offers will be discovered at the outset. Illinois also has a substantial interest in regulating the transfer of control of an Illinois or Illinois based corporation. The only burden of compliance with the Illinois Act is the extra cost incurred by the offeror, which will not be substantial in relation to the cost of acquiring another company. Although interstate commerce could be burdened by several states applying their takeover statutes to a tender offer, the Illinois Act, as noted, contains a comity provision.

Illinois has attempted to effectuate its legitimate interests without unduly burdening the making of tender offers by carefully retaining a market approach that favors neither management nor the offeror. The incidental impact on interstate commerce cannot be reduced further and still vindicate Illinois' legitimate interest in protecting its residents. The disclosures and additional time period provided the investor under the Illinois Act ensure that the investor will not make a hasty decision and that he will benefit from any alternative offer which may result. Such benefits stemming from the Illinois Act are substantial and should not be dismissed based on speculation that offerors will be deterred, as the requirements imposed by the Act are not of a magnitude that would discourage an offeror from proceeding. Invalidating the Illinois Act would enable an offeror to freely make an offer with the maximum of surprise and speed, but at the expense of

the protection afforded the shareholder in the Illinois Act. The benefits from effectuating Illinois' compelling legitimate interests clearly outweigh the minimal burdens imposed on interstate commerce.

CONCLUSION

For the above mentioned reasons, the Appellant, James Edgar, respectfully prays that this Honorable Court reverse the decision of the Seventh Circuit Court of Appeals.

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